Nos. 18-14163, 18-14400

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC d/b/a ADVANCE MASONRY SYSTEMS	:	
Petitioner/Cross-Respondent	:	No. 18-14163-G
v.	:	
NATIONAL LABOR RELATIONS BOARD	:	Board Case Nos.: 12-CA-221114
Respondent/Cross-Petitioner	:	

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1-1, the National Labor Relations Board, by its Deputy Associate General Counsel, hereby certifies that the following persons and entities have an interest in the outcome of this case:

1. Acevedo, Luis, Advanced Masonry Employee
2. Advanced Masonry Associates, LLC, Petitioner
3. Baker, Robert, Advanced Masonry Employee
4. Barlow, Jacob, Advanced Masonry Employee
5. Bricklayers and Allied Craftworkers Local 8 Southeast, Charging Party
6. Clark, Jeremy, Advanced Masonry Employee
7. Cohen, David , Regional Director, Region 12, NLRB
8. Collins, Valerie L., Attorney, NLRB
9. Dreeben, Linda, Deputy Associate General Counsel, NLRB

10. France, Mark, Advanced Masonry Employee
11. Ferrell, Amy, Assistant to Regional Director, NLRB
12. Greenlee, Forest, Advanced Masonry Employee
13. Harvey, Robert, Advanced Masonry Employee
14. Hearing, Gregory A., Thompson, Sizemore, Gonzales & Hearing, P.A.
15. Hickey, Dustin, Advanced Masonry Employee
16. Jason, Meredith, Managing Supervisor, NLRB
17. Karp, Ronald D., Advanced Masonry Associates, LLC d/b/a Advanced Masonry Systems
18. Kaplan, Marvin, Board Member, NLRB
19. Kyle, John W., Deputy General Counsel, NLRB
20. Leonard, Caroline, Field Attorney, NLRB
21. McFerran, Lauren, Board Member, NLRB
22. Morrison, Denise C., Supervisory Field Examiner, NLRB
23. Pearce, Mark Gaston , Board Member, NLRB
24. Pearson, Raymond, Advanced Masonry Employee
25. Pietsch, Robert, Advanced Masonry Employee
26. Reed, George, Advanced Masonry Employee
27. Ring, John F., Board Chairman, NLRB
28. Robb, Peter B., General Counsel, NLRB

29. Rosas, Michael A., Administrative Law Judge

30. Smith, John, Advanced Masonry Employee

31. Smith, Marvin Jay, Bricklayers and Allied Craftworkers, Local 8 Southeast

32. Stevenson, Walter, Advanced Masonry Employee

33. Thomas, Charles J., Thompson, Sizemore, Gonzales & Hearing, P.A.

34. Vol, Kira Dellinger, Supervisory Attorney, NLRB

35. Walker, Kimberly C., Kimberly C. Walker, P.C., counsel for Bricklayers and Allied Craftworkers, Local 8 Southeast

36. Wrench, David, Advanced Masonry Employee

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Dated at Washington, D.C.
this 15th day of February, 2019

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Local Rule 28-1(c), the National Labor Relations Board agrees with the Petitioner that an oral argument may be of assistance to the Court in its review of this case.

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ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Advanced Masonry Associates, LLC ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Order issued against the Company on August 17, 2018, and reported at 366 NLRB No. 164.

The Board had jurisdiction pursuant to Section 10(a) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(a). The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), because the unfair labor practices occurred in Florida. The Board's Order is final, and the Company's petition and the Board cross-application were timely because the Act imposes no time limit on such filings.

The Board's Order is based, in part, on findings made in an underlying representation proceeding, in which the Board certified the Bricklayers and Allied Craftworks Local 8 Southeast ("the Union") as the bargaining representative of a unit of the Company's employees. *See Advanced Masonry Associates, d/b/a Advanced Masonry Systems*, Board Case No. 12-RC-175179. Pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d), the record before this Court includes the record in the representation proceeding. *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). The Court may review the Board's actions in the representation proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's Order in whole or part. 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, *id.* § 159(c), to resume processing the representation case in a manner consistent with the Court's ruling. *Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999).

STATEMENT OF THE ISSUE

The ultimate issue is whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C § 158(a)(5), (1), by refusing to recognize and bargain with the Union. The underlying issue is whether the Board acted within its discretion in overruling challenges to nine ballots cast in the representation election.

STATEMENT OF THE CASE

This case involves the Company's admitted refusal to recognize and bargain with the Union, its employees' certified bargaining representative, in violation of Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). Its only defense to that otherwise unlawful refusal is that the Union was improperly certified because the Board erroneously overruled determinative challenges to ballots cast in the representation election. Before the Board, those challenges were consolidated for hearing and decision with several unfair-labor-practice allegations; two of the challenges rise or fall based on two unlawful-discharge findings in the consolidated order, which are the subject of a separate case currently pending before this Court.[1]

[1] On April 13, 2018, the Board issued its Decision, Order, and Direction in the consolidated proceeding, resolving the ballot challenges at issue here and finding that the Company unlawfully (1) threatened wage reductions if employees selected the Union, (2) suspended and discharged two employees because one supported the

I. PROCEDURAL HISTORY

A. The Representation Proceeding

The Company is a commercial-construction subcontractor that provides masonry services at jobsites throughout Florida, fulfilling contracts it obtains through competitive bidding. Once selected for a job, the Company uses crews of masons, supervised by foremen, to complete the contracted work. (D&O 9; Tr. 33, 126, 166, 445, 611, 636, 857-58, 1060.) Like many construction-industry employers, the Company's labor needs fluctuate depending on the number, scope, and progress of its projects, and it hires and lays off masons according to its operational requirements. (D&O 9; Tr. 239-40, 813, 816, 821, 860.)

From May 1, 2004, to April 30, 2016, the Company maintained a relationship with the Union pursuant to Section 8(f) of the Act, 29 U.S.C. § 158(f). Section 8(f) permits a construction-industry employer and a union to enter into a prehire agreement before the union has established majority support among the

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Union, and (3) more strictly enforced its fall-protection policy against employees because of their union activities. 366 NLRB No. 57.

The Company petitioned for review of the Board's order remedying those unfair-labor-practice findings with this Court, and the Board filed a cross-application for enforcement. *See* Case Nos. 18-11931 and 18-12449 (fully briefed). The Court has tentatively set that case for argument the week of May 13, 2019, in Miami, Florida. Simultaneously with this brief, the Board has filed a motion to consolidate the two cases for argument.

employer's employees.[2] After the Company announced that it would not renew their 8(f) agreement, the Union filed a petition to represent the Company's masons and bricklayers pursuant to Section 9(a) of the Act, 29 U.S.C. § 159(a), which establishes exclusive representation and bargaining relationships based on majority employee support. (D&O 12.)[3]

Because the bargaining unit comprised construction-industry employees subject to sporadic employment, the parties stipulated prior to the election that voter eligibility would be determined according to the Board's *Steiny*/*Daniel* test.[4] (D&O 12, 16.) As explained in detail below (pp. 12-13), pursuant to *Steiny*/*Daniel*, the Board determines eligibility based on the number of days worked during the year or two before the election but excludes from eligibility

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[2] *See Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 266 (1983).

[3] "D&O" references are to the Board's April 13 Decision, Order, and Direction in the underlying consolidated representation and unfair-labor-practice case, and "BDO" references are to the Board's August 17 Decision and Order in the failure-to-bargain unfair-labor-practice case presently before the Court. From the record in the consolidated proceedings, "Tr." references refer to the transcript; "GCX," "UX," and "CX," respectively, to exhibits introduced by the General Counsel, the Union, and the Company; and "J. Stip," to the joint stipulation. "Br." references are to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[4] *See Steiny & Co.*, 308 NLRB 1323, 1324-26 (1992); *Daniel Constr. Co.*, 133 NLRB 264, 266-67 (1961), *as modified*, 167 NLRB 1078 (1967).

(former) employees who either quit voluntarily or were terminated for cause before the end of their last job with the employer. (D&O 5-6, 18-19; GCX 1(d).)

The initial tally of ballots following the May 25 election showed 16 votes in favor of the Union, 16 against, 2 voided ballots, and 22 challenged ballots. (D&O 2, 16; GCX1(c)-(d).) Because the challenged ballots could be determinative, the Board's Regional Director ordered an investigation and hearing to resolve the challenges. Prior to the hearing, the Company and the Union agreed that the voters who cast 8 of the challenged ballots were ineligible, leaving 14 challenges outstanding. (D&O 16; (GCX1(d)-(e), (h).) The Company argued that all 14 voters were ineligible. It claimed that 9 had voluntarily quit: David Wrench, Robert Baker, Jacob Barlow, Jeremy Clark, Mark France, Forest Greenlee, Dustin Hickey, Robert Pietsch, and George Reed. And it claimed that it had terminated the remaining 5 for cause: Luis Acevedo, Walter Stevenson, Raymond Pearson, Robert Harvey, and John Smith. The challenges were consolidated with a related unfair-labor-practice case and were heard by an administrative law judge. (D&O 9.)

The judge found that the votes of Smith, Wrench, Barlow, Hickey, Greenlee, Clark, Reed, and Pearson should be counted because they were laid off and the votes of Acevedo and Stevenson should be counted because they had been unlawfully discharge, but that the votes of Harvey, Baker, France, and Pietsch

should not be counted because they fit the *Steiny/Daniel* exceptions. The judge also found that the Company had committed multiple unfair labor practices and sustained the Union's election objections based on the conduct underlying those violations, as well as an objection alleging that the Company had intentionally omitted names from the voter list. (D&O 18-19.)[5]

B. The Consolidated Board Decision, Order, and Direction

The Board (Chairman Kaplan; Members Pearce and McFerran) found that the Company failed to establish that Wrench, Barlow, Hickey, Greenlee, Clark, or Reed quit. It also concluded that Smith, Acevedo, and Stevenson had not been terminated for cause. Accordingly, it overruled 9 of the Company's 14 challenges.[6]

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[5] The Board requires an employer to provide a list of eligible voters prior to the election. *Excelsior Underwear*, 156 NLRB 1236, 1239-40 (1966).

[6] In agreement with the judge, the Board also found that Baker, France, and Pietsch were ineligible to vote because they had quit and that Harvey was ineligible because the Company had terminated him for cause. Contrary to the judge, the Board concluded that the Company demonstrated Pearson was ineligible because he had been terminated for cause.

The Board also agreed with the judge that the Company committed several violations leading up to the election, which also constituted objectionable conduct that would warrant a new election if the challenged ballots did not favor unionization. (D&O 6.) As noted, the portion of the order remedying those violations is before the Court in Case Nos. 18-11931 and 18-12449.

The Board directed the Regional Director to open and count those 9 ballots. All had been cast in favor of unionization. The revised tally showed 25 votes in favor and 16 against unionization, and the Union was certified as the employees' collective-bargaining representative. (BDO 1 & n.2).[7]

C. The Failure-to-Bargain Unfair-Labor-Practice Proceeding

Once certified, the Union requested that the Company recognize and bargain with it. The Company refused in order to force a review of the Union's certification.[8] In response, the Union filed an unfair-labor-practice charge, and the Board's General Counsel issued a complaint alleging that the Company's refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). The Company's answer admitted its refusal to bargain but challenged the Union's certification, and the General Counsel moved for summary judgment. (BDO 1.)

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[7] The revised tally is attached to the General Counsel's Motion for Summary Judgment in the refusal-to-bargain case.

[8] Board certifications under Section 9(c) of the Act, 29 U.S.C. § 159(c), are not directly reviewable. *See Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1261 n.1 (11th Cir. 1999). "[A]n employer can obtain review … only by refusing to bargain," triggering a final Board Order finding that the employer has violated the Act by doing so. *Id.* The court "can then examine the Board's representation decision as part of its review of the unfair labor order." *Id.*

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 17, 2018, the Board (Members Pearce, McFerran, and Kaplan) issued its Decision and Order in the unfair-labor-practice case presently before the Court. The Board granted the motion for summary judgment, finding that the Company unlawfully refused to recognize and bargain with the Union. (BDO 1-3.)

The Board's Order requires the Company to cease and desist from refusing to bargain with the Union and from, in any like or related manner, interfering with its employees' exercise of their rights under Section 7 of the Act, 29 U.S.C. § 157. Affirmatively, the Order directs the Company to recognize and bargain with the Union upon request, to embody any understanding reached in a signed agreement, and to post a remedial notice. (BDO 2-3.)

SUMMARY OF ARGUMENT

The Company's employees selected the Union as their representative. The Company admittedly refuses to recognize and bargain with the Union because it disagreed with the Board's determination regarding nine employees' eligibility to vote in the election. Because the Board acted well within its discretion in resolving the Company's ballot challenges according to the applicable, construction-industry eligibility standard, substantial evidence supports the determination that the Company's refusal to bargain violates the Act.

The Board first reasonably concluded the Company laid off employees Wrench, Barlow, Hickey, Greenlee, Clark, Reed, and Smith, given that all seven left the Company in groups, at times when successive phases of the project they were working on neared completion. That finding is further supported by credited testimony establishing Smith, Wrench, and Reed were laid off. In addition, most of the seven were later rehired by the Company and, tellingly, the Company classified five as laid off in its own personnel records. The Company failed to meet its burden to prove that the employees were ineligible. Its arguments rely largely on discredited testimony and suspect business records.

The Board similarly acted within its discretion in overruling the challenges to ballots cast by employees Acevedo and Stevenson. Substantial evidence supports the Board's finding that they were unlawfully discharged. Applying its well-established *Wright Line* framework, the Board found that the Company's animus toward Acevedo's union activities was a motivating factor for both discharges. The Board cited the close temporal proximity of the discharges to Acevedo's union activity, to the representation election, and to an unlawful threat by the manager who discharged them, as well as the Company's disparate treatment of similarly situated employees and pretextual explanation for its actions. The Company's contrary arguments disregard the weight of the evidence in support of the Board's finding.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY'S ADMITTED REFUSAL TO BARGAIN VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

Section 7 of the Act, 29 U.S.C. § 157, grants employees the right to choose a collective-bargaining representative. Employers have a corresponding duty to bargain with their employees' chosen representatives, and a refusal to bargain violates Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5). Moreover, a violation of Section 8(a)(5) results in a derivative violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), which makes it unlawful for employers to interfere with employees' exercise of their Section 7 rights. *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 n.1 (D.C. Cir. 2011). The Court reviews the Board's finding of an unlawful refusal to bargain for substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-91 (1951); *accord Cooper/T. Smith*, 177 F.3d at 1260, 1261 & n.1.

The Company admits (Br. 27 n.4) that it refused to bargain with the Union, so the sole issue is whether the Board erred in overruling nine of the Company's ballot challenges and consequently certifying the Union as bargaining representative. The Board enjoys wide discretion to conduct representation elections, including the determination of voter eligibility, and

its representation decisions "warrant special respect on review." *NLRB v. Dynatron/Bondo Corp.*, 992 F.2d 313, 315 (11th Cir. 1993) (quoting *M & M Supermarkets, Inc. v. NLRB*, 818 F.2d 1567, 1573 (11th Cir. 1987)); *see also TRW-United Greenfield Div. v. NLRB*, 716 F.2d 1391, 1393 (11th Cir. 1983) (Board rulings on ballot challenges reviewed for abuse of discretion). Because the Board acted well within its discretion in overruling each of the ballot challenges, the Company's refusal to recognize and bargain with the Union (Br. 27 n.4) violates Section 8(a)(5) and (1) of the Act. *NLRB v. Dixie Lime & Stone Co.*, 737 F.2d 1556, 1557 (11th Cir. 1984); *TRW-United Greenfield Div.*, 716 F.2d at 1393.

A. An Employee Who Meets the Construction-Industry Voter-Eligibility Formula Is Eligible To Vote Unless the Employer Proves that He either Voluntarily Quit or Was Terminated for Cause

In *Steiny & Co.*, 308 NLRB 1323 (1992), and *Daniel Construction Co.*, 133 NLRB 264 (1961), *as modified*, 167 NLRB 1078 (1967), the Board adopted a voter-eligibility test for elections in the construction industry. The test ensures representation of all employees who have a reasonable expectation of future employment and thus a legitimate "continuing interest in working conditions which would warrant their participation in an election to determine a representative for collective bargaining. . . ." *Daniel*, 133 NLRB at 266. Specifically, it enfranchises "all employees in the unit who have been employed for a total of 30

days or more within the period of 12 months, or who have had some employment in that period and who have been employed 45 or more days within the period of 24 months, immediately preceding the eligibility date for the election," with two exceptions. *Id.* at 267. Employees are not eligible to vote if they were either "terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed" by the employer. *Daniel*, 167 NLRB at 1081. The burden of proof rests on the party contesting eligibility. *Sweetner Supply Corp.*, 349 NLRB 1122, 1122 (2007).

As explained below, the Board acted well within its discretion in overruling the Company's nine ballot challenges and ordering the ballots counted. It is undisputed that each of the employees met the *Steiny/Daniel* eligibility test, and the record amply supports the Board's finding that the Company failed to prove that any of them quit or were fired. As detailed below, that finding is based largely on credibility determinations, which this Court will overturn only if "'inherently unreasonable,' 'self-contradictory,' or 'based on an inadequate reason.'" *NLRB v. Allied Med. Transp., Inc.*, 805 F.3d 1000, 1005 (11th Cir. 2015) (quoting *NLRB v. Goya Foods*, 525 F.3d 1117, 1126 (11th Cir. 2008)); *see also McClain of Georgia*, 138 F.3d 1418, 1422 (11th Cir. 1998) (court "will not question the decisions made by [a judge] as to which witnesses to believe or disbelieve" absent showing determinations were "self-contradictory or unreasonable"). Moreover, because the

initial vote was tied, and each one of the challenged ballots favored representation, the Union's certification is valid—and the Board is entitled to enforcement of its Order—should the Court uphold the Board's decision to overrule even one of the Company's challenges.[9]

B. The Board Acted Within Its Discretion in Concluding that Wrench, Barlow, Hickey, Greenlee, Clark, Reed, and Smith Were Eligible To Vote

The Board reasonably found that Wrench, Barlow, Hickey, Greenlee, Clark, Reed, and Smith had been laid off, and that Company failed to prove they quit voluntarily or were terminated for cause.

1. The Bethune project; the challenged voters' employment history and status

From mid-November 2014 to mid-June 2016, the Company worked a construction project at Bethune-Cookman University in Daytona Beach, Florida. The construction was completed in two phases, each consisting of laying block, brick, and concrete. (D&O 10; Tr. 651, 815-16, 821, 862.) From May 2015 until

[9] In addition to overruling the Company's challenges, the Board found that the Company's unfair labor practices and objectionable conduct would warrant a new election even if the revised tally did not support representation. (D&O 1 n.3.) However, that conditional ruling relied in part on Acevedo's and Stevenson's unlawful discharges. Should the Court disagree with the Board on all nine challenges, remand would be appropriate for the Board to consider whether the remaining objections, some of which the Board found it unnecessary to address, D&O 1 n.3, would warrant a rerun election.

April 24, 2016, Foreman McNett supervised the Bethune crew, then Foreman Robert Dutton assumed that role. As the project progressed, the Company's manpower needs, and thus the size of its workforce, fluctuated. During the last 6 months of the project, both gradually diminished. (D&O 10; Tr. 650, 862.)

By January 15, 2016, block-laying work on the project was nearly completed. That day, the Company pared its Bethune workforce, once as high as 70 masons, down to 40. McNett personally laid off several masons and told them to file for unemployment. One of the laid-off employees, David Wrench, applied for unemployment benefits, which the Company did not contest. The Company's Reason for Leaving form indicated that he quit voluntarily. (D&O 10; CX27, Tr. 862, 988-99, 1000, 1004.) Another was John Smith, a mason since 1977, who began working on and off for the Company in 2008 and had worked full-time on the Bethune project since July 2015. When letting Smith go, McNett explained that block work, which Smith had been doing, was decreasing and that the Company needed bricklayers at that point. Smith does not do brickwork. (D&O 10 & n.10; Tr. 997, 1004, 1046-47.) The Company's initial voter list, based on its payroll records, classified Smith as laid off; his Reason for Leaving form indicated that he was terminated for poor work performance and attendance. Subsequently, the Company offered Smith work on several other projects, and he

was working for the Company at the time of the hearing. (D&O 10 & n.10; CX32, Tr. 907, 997, 999, 1005-06.)

The Bethune project continued to wind down, and the Company completed the brickwork by April 8. (D&O 10; Tr. 703-04, 712.) That first week of April, the Company laid off another group of masons, including Jacob Barlow, Dustin Hickey, Forest Greenlee, and Jeremy Clark. Each had worked for the Company on and off for years, and the Company's initial voter list classified each of them as laid off. (D&O 10-11 & nn.8, 14-16; UX2, UX3, UX24, UX26, CX27, Tr. 707-08, 815-16, 1019-27.) Later, the Company rehired Greenlee and offered to rehire Barlow. (D&O 10-11 & n.16; Tr. 708; 711.)

On April 15, the Company laid off George Reed. Reed had also worked for the Company on and off for years. Reed was a union member, and Foreman Dutton informed union representative Mike Bontempo that Reed had been "laid off, put on the couch temporarily." (D&O 11 & n.17; CX27, CX28, Tr. 815-16, 894-910, 1017-19, 1034, 1039-45, 1049.) Reed's Reason for Leaving form stated that he quit to take a better job. The Company later rehired him. (D&O 11; Tr. 1039-49.)

2. The Board reasonably found that Wrench, Barlow, Hickey, Greenlee, Clark, Reed, and Smith remained eligible to vote

Based on the credited evidence, the Board found (D&O 5) that the Company laid off Wrench, Smith, Barlow, Hickey, Greenlee, Clark, and Reed with a reasonable expectation of recall, so they remained eligible to vote. As the Board explained, Wrench and Smith left the Bethune project with a group of other masons as block work tapered off, and the other five masons left over the first few weeks of April, along with other masons, as brick work concluded. That the employees were laid off when the Company was finishing aspects of the Bethune project, and that they left in groups, both indicate that their departures were layoffs due to cyclical labor needs, rather than "coincidental" or coordinated resignations. (D&O 5.) And that interpretation was corroborated by other record evidence, as the Board explained. The judge explicitly credited Wrench's and Smith's testimony that they were laid off (D&O 10 & nn.10 & 11), based in part on their demeanor (D&O 9). *See McClain of Georgia*, 138 F.3d at 1422 (demeanor-based credibility resolutions are entitled to substantial deference). Wrench's testimony that he was laid off and did not quit was further corroborated by McNett's direction to the masons he let go on January 15 to file for unemployment (which Smith also recounted) and by the Company's failure to contest Wrench's application for unemployment—as the Board noted (D&O 5 n.13, 10 n.11),

employees who quit are typically not eligible for unemployment. Similarly, the Company's classification of Smith as laid off on its initial voter list, and his later reemployment, both tend to support his assertion that he was laid off rather than terminated for shoddy workmanship. (D&O 5, 10 n.10.) Indeed, Smith was working for the Company when he testified (D&O 10 n.10; Tr. 714, 997-98, 1005), which adds to his credibility because he was "testifying adversely to [his] pecuniary interest." *Flexsteel Indus.*, 316 NLRB 745, 745 (1995), *enforced mem.*, 83 F.3d 419 (5th Cir. 1996); *see also Shop-Rite Supermarket*, 231 NLRB 500, 505 n.22 (1977) (same).

With respect to Reed, the judge noted that Foreman Dutton, who testified, did not dispute that he had contemporaneously characterized Reed's departure as a layoff, corroborating the credible testimony of Bontempo. Moreover, like Smith, Reed, Greenlee, and Hickey were all ultimately rehired.[10] Finally, the Company's classification of Barlow's, Hickey's, Greenlee's, and Clark's departures as layoffs, in its own personnel records, is especially telling.

[10] Although the Board did not make a specific finding with respect to Hickey, his reemployment is established by McNett's uncontradicted testimony. (Tr. 711.)

In addition to the above-described evidence indicating that the seven challenged voters were laid off, the Board explained that its decision to overrule the challenges to their ballots was supported by the Company's "fail[ure] to present sufficient reliable evidence to sustain its burden" to prove that the challenged voters either quit or were terminated. (D&O 5.) The Company's cursory critiques of the Board's decision fail because they depend on overturning credibility determinations and disregard the Company's burden.

3. The Company failed to demonstrate that Wrench, Barlow, Hickey, Greenlee, Clark, and Reed quit

In essence, regarding Wrench, Barlow, Hickey, Greenlee, Clark, and Reed, the Company asks the Court to reweigh the evidence, reexamine the factfinder's credibility determinations, and conclude that groups of employees were not laid off but coordinated to quit together. The problem for the Company is that it presented no credible evidence demonstrating any such coordination, or even suggesting that the Board's findings were unreasonable. The only evidence the Company cites to support its claim that the six employees quit is the discredited testimony of Foreman McNett and internally inconsistent business records. Neither comes close to satisfying the Company's burden of proof.

As the judge found, McNett's general testimony denying that the Company laid off anyone prior to April 8 was "not credible" given his concession that "the last brick was laid" by that point and the testimony of Chief of Operations Marc

Carney, "that the [Bethune] project essentially concluded in April 2016." (D&O 10 n.8; Tr. 652-54, 707, 712, 721, 815-16, 896, 1005.) Moreover, McNett qualified his testimony that the masons voluntarily left for other jobs with the admission that he knew they "didn't want to quit working with [the Company]; they wanted to stay working when [the Bethune project] was done." (D&O 10 n.8; Tr. 653.) The judge, who observed each of the witnesses, also explicitly discredited McNett's "vague" testimony that Barlow, Hickey, and Clark quit. (D&O 9, 11 nn.14 & 16.) And, in reaching his well-founded decisions to credit Wrench, Bontempo, and Smith regarding Wrench's, Reed's, and Smith's layoffs, the judge implicitly discredited contrary testimony, including McNett's assertions that Reed resigned despite McNett's efforts to retain him. (Tr. 1052-53.)

The Company's challenges to those credibility determinations do not warrant rejecting the primary factfinder's judgments. It argues (Br. 53) that Wrench's account is suspect because he "miraculously" secured employment shortly after leaving. But Wrench explained that, after applying for unemployment, he contacted the Union for a job referral and got one. As the Company acknowledges, Wrench used the same process to secure employment with the Company. Likewise, Wrench's "conce[ssion]" (Br. 53) that many masons remained employed after he was laid off is unremarkable, even expected; as Carney testified, masonry work "ebbs and flows." (Tr. 860.)

With respect to Bontempo, the Company presents no authority supporting its cursory argument (Br. 53) that the judge erred in crediting him because he misrepresented his criminal record on his employment application, and because the judge discredited other portions of his testimony.[11] And the Company does not seriously question Smith's credibility, merely asserting in passing that it was "unreasonable" to credit him because his account "was contradicted by the great weight of the evidence" (Br. 26), an argument it never details and which is contradicted by the Board's assessment of the record, *see* pp. 18-19.

Finally, based on internal inconsistency and conflicting credited testimony, the Board found unreliable the business records cited by the Company to prove the six masons quit. (D&O 5, 10-11 & nn. 10, 15, 17.) Notably, the Company originally identified four of the challenged voters as laid off on its list of eligible voters, which it based on its own payroll records. But after the election, the Company argued that those same employees had quit, citing Reason for Leaving forms it had produced in response to a subpoena. And, of course, those forms contradicted credited testimony that the employees were laid off.

[11] *See NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950) (L. Hand, J.) ("nothing is more common in all kinds of judicial decisions than to believe some and not all" of a witness' testimony), *vacated and remanded on other grounds*, 340 U.S. 474 (1951).

4. The Company failed to demonstrate that it fired employee Smith for cause

To support its contention that it discharged Smith for poor work performance and attendance, the Company once again relies on a vastly different version of the facts than those found by the Board. Specifically, the Company contends that Smith—a mason since 1977, who had worked for the Company for years—was fired because his masonry work "was bad and had to be torn down." (Br. 49.) Furthermore, the Company asserts that when it rehired Smith, the new job "involve[ed] different masonry skills," namely installing smaller concrete blocks. (Br. 49.) And it argues that only Smith and Wrench were fired on January 15, and that Smith's belief that he was laid off was unreasonable because it was based solely on throwaway advice that he file for unemployment. (Br. 50-51.)

In other words, the Company's challenge largely boils down to a disagreement with the credibility findings underlying the Board's narrative. As just demonstrated, however, it has failed to show that the judge's findings were erroneous. To the contrary, the judge reasonably credited Smith's version of events over that of the Company's witnesses and Smith's Reason for Leaving form. As detailed above, that credibility determination was supported by the judge's observation of witness demeanor and by the weight of the testimonial and documentary evidence.

In its brief, the Company also posits for the first time that because "poor work performance due to incapacity" is not disqualifying under Florida's unemployment law, McNett's instruction to Smith that he should apply for unemployment does not support Smith's "belie[f] that he had been laid off." (Br. 51.) As an initial matter, while the Company excepted to the judge's inference that *Wrench's* filing for unemployment supports the finding that Wrench was laid off, the Company never made a similar argument regarding McNett's advice that *Smith* file for unemployment. Accordingly, the Court is precluded from addressing that new argument. *See* 29 U.S.C. § 160(e) (absent extraordinary circumstances, court shall not consider objection not raised to Board); *accord Goya Foods*, 525 F.3d at 1122 n.2.

In any event, and more to the point, the Company is mistaken in claiming that "the basis for Smith believing that he had been laid off" (Br. 51) was solely McNett's advice to seek unemployment. Smith also denied ever being told he was discharged for cause or that he was ineligible for rehire. (Tr. 1000-01.) And, more specifically, he testified that McNett had explained that Smith was being laid off because the block work, Smith's specialty, was "just about done" on the Bethune project and the Company was "starting on bricks," which Smith did not do. (Tr. 1004.) Notably, Wrench's testimony that the Company was "cutting the crew down" corroborates Smith's account. (Tr. 992.)

Finally, contrary to the Company's argument, the Board did not "expand" the established eligibility test by considering whether the Bethune project was winding down when Smith (and the other challenged voters) left the Company's employ and whether the Company ultimately rehired Smith (and others). (Br. 50.) That argument is based on a misunderstanding of the Board's rationale, which followed the undisputedly applicable *Steiny/Daniel* test. The Board did not, as the Company implies, base its finding that Smith (and the other six masons) were eligible to vote, or had a reasonable expectation of recall, on either diminishing work or eventual recalls.

Rather, the Board found that the challenged voters had a reasonable expectation of recall because they met the construction-industry eligibility formula. *Steiny*, 308 NLRB at 1324-25. The Board then rejected the Company's argument that Smith was fired for cause (and that the other six masons quit), which would, as the Company argues, establish as a matter of law that they did not reasonably expect recall. *Id.* In making the factual determination as to whether particular employees were laid off, quit, or were terminated, the Board considered, among other evidence, the diminishing Bethune workload and the Company's subsequent rehiring of certain mason. It did not, as the Company asserts, adjust or constrain the

two established *Steiny/Daniel* eligibility exceptions. Likewise, the Board considered the Company's initial voter list in determining whether employees had been laid off, quit, or been discharged. The significance of the list was that it represented the Company's own interpretation of its payroll records classifying certain employees as laid off, in direct contradiction to other company records suggesting the employees in question quit or were fired. The Board's analysis did not call into question the uncontroversial proposition, cited by the Company, that nothing prevents "an employer from timely amending a [voter eligibility] list." (Br. 50.)

In sum, the Board reasonably found that the Company failed to prove Wrench, Barlow, Hickey, Greenlee, Clark, Reed, and Smith were ineligible to vote. Accordingly, the Board acted well within it discretion in ordering that their ballots be counted.

C. The Company Failed To Demonstrate that It Fired Acevedo and Stevenson for Cause

The Company does not contest that, like the other challenged voters, Acevedo and Stevenson satisfied the *Steiny/Daniel* eligibility formula. (D&O 5 n.11.) In the consolidated case, the Board found that the Company had discriminatorily discharged the two employees because of Acevedo's union activities. The Board thus necessarily found (D&O 5 n.12) that the Company had

not proven that they were discharged for cause and overruled the challenges to their ballots. As demonstrated below (and in 11th Cir. Case Nos. 18-11931, 18-12449), substantial evidence supports that unfair-labor-practice finding.

1. The Board's findings of fact[12]

a. The Company's safety policies and procedures

The Company's safety policies and procedures are detailed in an employee handbook. The handbook lays out general safety rules and requires employees to "[a]lways wear or use appropriate safety equipment as needed. Wear appropriate personal protective equipment, like . . . fall protection, when working on an operation which is potentially hazardous." (D&O 9; CX2.) The handbook further provides that violations of safety rules can result in "disciplinary action, including termination." (D&O 9; GCX2(c), CX2, Tr. 78-79.)

The Company also maintains a separate, more detailed fall-protection policy, which it provides to employees at their initial safety orientation. That policy mandates that when an employee is working at an elevation of 6 feet or higher on a scaffold where a fall risk exists, the employee must use appropriate protective equipment. (D&O 9-10; GCX2(a), Tr. 71-73, 152, 518.) Specifically, it requires a

[12] Like Company's brief (Br. 7 n.2), this brief will address the two ballot challenges based on the unlawful discharges with essentially the same argument as the Board's brief in the related case

body harness with a safety strap and a retractable lifeline (retractor), and instructs employees not to connect two safety straps, or a retractor and a strap, to each other. In-person trainings on jobsites provide employees with further details regarding the correct combinations of safety equipment to use in various situations, and how to "anchor" their equipment properly to their work area. Finally, the fall-protection policy warns that the Company has "zero tolerance" towards violations. (D&O 9-10; GCX2(a), Tr. 71-74.)

Safety policies are monitored on a companywide basis by Safety Director Aleksei Feliz and Safety Coordinator Fernando Ramirez. Both Feliz and Ramirez travel between the Company's various jobsites to check safety conditions, and Ramirez conducts safety trainings for company employees. (D&O 10; CX5-6, J. Stip. 1-2, Tr. 25-26, 513.) In addition to those visits, Feliz and Ramirez identify safety topics for foremen to cover in weekly, mandatory meetings called "toolbox talks." (D&O 10; Tr. 79, 611-13, 755-57.) The foremen also continuously monitor and ensure safe working conditions and equipment on each jobsite. (D&O 10; Tr. 33, 126, 166, 445, 611, 636, 812-13.)

b. The Company hires employees Luis Acevedo and Walter Stevenson, and provides them with safety training

The Company hired employees Acevedo, who was referred by the Union, and Stevenson, who was not a union member, in January 2016, and assigned them

to its Westshore Yacht Club ("Westshore") jobsite. (D&O 11; Tr. 125, 392-93.) Two weeks after they began work, Safety Coordinator Ramirez came to the jobsite to conduct a safety orientation, which both Acevedo and Stevenson attended. (D&O 11; GCX2(c), Tr. 69-70, 414, 515.) The 75-minute orientation explained the Company's general safety standards and included a 30-minute presentation about the fall-protection policy. (D&O 11; GCX2(a).)

During that presentation, Ramirez demonstrated how to wear a harness properly, as well as several methods employees could use to fasten their harnesses to their work areas, discussing how to create floor anchors and when to use a long or short safety strap, or a retractor. (D&O11; GCX2(a), 20, 24, Tr. 133-34, 415-16, 558.) He did not demonstrate, or have employees practice, correct ways to attach a harness to scaffolding. Rather, referring to an illustration, Ramirez told employees to use straps and retractors when tying harnesses to scaffolding to ensure at least 3 feet of clearance from the ground in case of a fall, and warned them not to hook a retractor directly to a scaffold. (D&O 11; Tr. 133-34, 414-17, 515, 523-28, 558, CX7, GCX2(a)-(b).) Ramirez also explained that a safety strap and retractor could be used in combination when an employee's anchoring point was above his shoulders, if the employee looped the strap. Finally, Ramirez answered questions about the fall-protection policy, including from Acevedo and

Stevenson, and warned employees that the Company had "zero tolerance" for violations of the policy. (D&O 11; Tr. 132-36, 415-17, 462, 530-32, GCX2(c).)

c. Acevedo openly and actively supports the Union

While working at the Westshore jobsite, Acevedo was an active union supporter. He met with the Union's representative during the representative's visits to the site, wore union shirts and stickers, and spoke with other employees about the advantages of the Union, including insurance and retirement benefits. (D&O 13; Tr. 399, 404.) When Acevedo's union dues were not deducted from his check, he asked his foreman about it. After his foreman was unable to determine why the dues were not being deducted, Acevedo elevated his concern to Feliz, who addressed it. (D&O 13; Tr. 399-400, GCX13.)

In mid-April, the Company transferred Acevedo and Stevenson to a new jobsite at the University of Tampa ("UT"). (D&O 12; Tr. 125, 395.) At the UT jobsite, Acevedo continued his union activities. He acquired a second union shirt, which enabled him to wear his union shirts most work days, more than any other employee. He also continued to meet with the Union's representative during the representative's visits to the site, and to speak with other employees about the benefits of the Union. Acevedo's union activity "did not go unnoticed." (D&O 12-13; Tr. 405-07.) For example, foreman Mario Morales saw Acevedo signing papers the representative brought to the jobsite. (D&O 13; Tr. 405-07.)

d. Safety director Feliz tells employees that wages will decrease if the Union wins the election

In early May, company owner Richard Karp spoke to employees, with Safety Director Feliz translating for the Company's Spanish-speaking employees, to explain the upcoming representation election and encourage employees to vote. When asked whether wages would go down if the employees decided not to unionize, Karp responded that wages were determined by the market. (D&O 13; Tr. 410-11, 846-47.)

Later in the day, Feliz spoke with eight employees, including Acevedo. (D&O 13; Tr. 129-30, 412, 648.) Feliz explained why the Company opposed the Union and urged the employees to "vote no, no union, because the Union is taking our money." (D&O 13; Tr. 410-12, 846-47.) He also informed them that a union victory would result in a $4-per-hour wage decrease. Acevedo disputed Feliz's assertion, resulting in a silent glare from Feliz. (D&O 13 n.36; Tr. 412.)

e. On May 16, the Company suspends Acevedo and Stevenson for violating the fall-protection policy, their first offense

Foremen Brett McNett and Mario Morales supervised the crew at the UT jobsite. The employees at the site worked in pairs, initially laying a brick veneer over the new 40- to 50-foot-high exterior wall of the building. (D&O 12; Tr. 126-27, 153, 396, 421.) They were not required to wear harnesses or tie off during that outside work because they used scaffolding without a fall risk. As the exterior

work was completed, the Company moved its employees, including Acevedo and Stevenson, to work on stairs and tall columns in the building's interior. The Company did not conduct any general safety orientation, like the one at the Westshore jobsite, for employees at the UT jobsite. (D&O 12; Tr. 395-96, 617-18, 670, Jt. Stip. 8-9.)

On May 16, employees attended a morning safety meeting led by the general contractor and a toolbox talk conducted by foremen McNett and Morales. McNett reminded employees of the Company's fall-protection policy and emphasized the requirement that employees be tied off at elevations higher than 6 feet where there was a fall risk. (D&O 14; Tr. 137-38, 148-49, 153, 621.) McNett noted that some employees were being transferred from the outside area of the jobsite to the inside area. He also noted that safety equipment was largely unnecessary outside, due to closed scaffolds, but was required on the inside scaffolds because they were all open and over 6-feet high. McNett warned the employees that anybody not properly tied off would be fired. (D&O 14; Tr. 137-38, 148-49, 153, 621.) Neither McNett nor Foreman Morales explained, or demonstrated, how to properly tie off harnesses to the type of scaffolding used on the UT site's interior work areas. (D&O 14; 415-16.) During the same meeting, foreman McNett, "who regularly disparaged the Union," informed employees at the site that unionization "won't be good for wages." (D&O 13; Tr. 129-20, 648.)

Shortly after the meeting, Morales observed that Acevedo and Stevenson, who were paired to work together, were on an inside scaffold and were not wearing their safety harnesses. Morales asked them whether they had attended the toolbox talk, at which McNett had instructed employees to tie off when exposed to falls over 6 feet. (D&O 14; 139, 158, 422, 424, 625-27.) Acevedo replied that he had attended the meeting but stated that he had not been tied off when working at higher elevations on the exterior of the building. (Tr. 423-24.) Morales explained that employees were not required to tie off while working on the building's exterior because there was no fall risk and instructed both men to tie off. (D&O 14; Tr. 422, 625-26.)

Both Acevedo and Stevenson donned their harnesses and each tied off improperly to the scaffold where they were working. Acevedo used an overlong retractor-strap combination to attach his harness to the scaffold. Stevenson used his retractor incorrectly by attaching it directly to the scaffold. (D&O 14; Tr. 139, 158, 422 424, 625-27.)

Meanwhile, Morales informed McNett that Acevedo and Stevenson had not been wearing safety equipment while working on indoor scaffolds. (D&O 14; Tr. 623-25.) McNett responded, "tell them it's a good thing I didn't catch them and make sure they get tied off properly." (Tr. 624.) He then went to check on them and, finding them improperly tied off, immediately scolded them for the

safety violation. McNett asked Acevedo and Stevenson if they had received fall-protection training. Both Acevedo and Stevenson stated that the Company had never trained them on how to tie off while working on a scaffold. (D&O 14; Tr. 423-24, 625, 628-29.) When McNett properly secured Acevedo's and Stevenson's equipment, Acevedo asserted that the method McNett used—tying them off to the scaffold—was against Occupational Safety and Health Administration (OSHA) regulations. In response, McNett walked away. (D&O 14; Tr. 423-24, 628.)

After confronting Acevedo and Stevenson, McNett called Feliz and told him about the incident, citing specifically the employees' claim that the Company had never trained them how to properly tie off to scaffolding. (D&O 14; Tr. 75, 80, 89.) After confirming that they had come from the Westshore jobsite, Feliz told McNett that all of the employees at that jobsite had been trained, and that he would dismiss the employees involved if they had in fact received the relevant training. Feliz then instructed Ramirez to go to the Westshore site to ascertain whether Acevedo and Stevenson had been trained on tying off when they worked there. (D&O 14; 75, 80, 89, 536.) Ramirez found records from the February safety training he had conducted, confirming that both Acevedo and Stevenson had signed the attendance sheet. (D&O 2, 14; Tr. 90, 517.)

After reporting back to Feliz that Acevedo and Stevenson had been trained, Ramirez traveled to the UT jobsite. With McNett, he confronted the two

employees, who admitted that they had received the relevant training. (D&O 2, 14; Tr. 426-27, 632.) Ramirez then recontacted Feliz and, acting on his orders, suspended both employees for tying off incorrectly. The suspension paperwork, labeled a "warning notice," stated that "the employee was not [tied off] properly" and indicated that the incident was a level "1" offense on a scale increasing from "1" to "2" to "3" to "FINAL." (D&O 14; Tr. 139, 426-27, 539-40, 632-33, GCX5, GCX6.) When informed of their suspensions, both employees referenced the method McNett had used to fix their straps that morning. Acevedo again challenged whether tying off to a scaffold was correct and whether safety equipment was necessary on the indoor scaffold. (D&O 15; Tr. 423-24, 628.) Stevenson asked, "Why weren't we told that [particular method] before we got up there? You just said tie off." (D&O 14; Tr. 140-41.) McNett replied, "It's not in my hands. I was told to send you home, and you're in review." (D&O 14; Tr. 141.) The suspensions were the first discipline of any kind that either Acevedo or Stevenson received while working for the Company. (D&O 14; GCX5, GCX6, Tr. 139, 141-42, 427, 429.)

f. After consulting with the Company's owners because of Acevedo's union activities, Feliz discharges Acevedo and Stevenson

Feliz was authorized to determine Acevedo's and Stevenson's discipline, up to and including discharge. Because he knew that Acevedo supported the Union,

and in light of the upcoming representation election, Feliz decided instead to call the Company's owners to discuss the incident before imposing discipline beyond the suspension. (D&O 2, 14; Tr. 91-93.) During that conversation, the final decision was made to discharge both Acevedo and his work partner Stevenson. (D&O 14; Tr. 91-93, 874.)

The next day, Acevedo arrived at work and McNett told him he had been fired. (D&O 14; Tr. 141, 428-29.) In response to Acevedo's request for an explanation, McNett said that the discharge was based on Acevedo's violation of the fall-protection policy. Acevedo again argued that the Company's preferred tie-off method violated OSHA regulations. (D&O 14-15; Tr. 428-29, 634.) Acevedo returned to the parking lot, called Stevenson, and told him that they had been fired. Stevenson went to the jobsite anyway and spoke with McNett, who told him that the termination decision had come "from above, it's not me." (D&O 15; Tr. 141.)

Prior to May 16, the Company had disciplined several employees with warnings or suspensions, but not with terminations, for first or second violations of the Company's fall-protection policy. (D&O 3, 15, 17-18; Tr. 389-90, 433-34, 546-47, 636-37, 899, GCX3, GCX4, GCX8, CX34.) Also prior to that day, Acevedo and Stevenson had worked inside at the UT site on scaffolds without harnesses and no one had instructed them to don safety equipment. (D&O 14; Tr. 139, 154, 418, 424-25.) On May 16, some other employees were not wearing

their safety harnesses, and those employees who were using safety equipment were tied off in different ways, not all according to McNett's instructions. (D&O 14 n.40, 15 n.44; Tr. 160, 424-25.) No other employee was disciplined for tying off improperly at the UT site that day.

2. An employer violates the Act by taking adverse action against an employee for engaging in union activities

Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), provides that it shall be an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." An employer thus violates Section 8(a)(3) by discharging an employee for engaging in protected union activity. *See McClain*, 138 F.3d at 1421, 1423 (discharge).

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the Board's test, articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1981), for determining whether an employer took adverse action based on union animus or had a lawful motivation. *Purolator Armored v. NLRB*, 764 F.2d 1423, 1428 (11th Cir. 1985). Under that test, a reviewing court must determine whether substantial evidence supports the Board's finding that union activity was a "motivating factor" for the discipline. *Transp. Mgmt.*, 462 U.S. at 401; *McClain*,

138 F.3d at 1424.[13] Where union activity is shown to be a motivating factor, the adverse action is unlawful unless the record as a whole compels acceptance of the employer's affirmative defense that it would have taken the same action in the absence of protected conduct. *Transp. Mgmt.*, 462 U.S. at 401-03; *McClain*, 138 F.3d at 1424.

Because direct evidence is often impossible to obtain, the Board may rely on circumstantial evidence and inferences reasonably drawn from the totality of the evidence to determine the employer's true motives. *See, e.g.*, *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *McClain*, 138 F.3d at 1424; *Purolator Armored*, 764 F.2d at 1429. For example, evidence that an employee engaged in union activity of which the employer was aware, and that the employer harbored animus towards that activity, suffices to show an unlawful motivating factor. *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994),

[13] The Company has framed a portion of its argument (Br. 32-42) as a challenge to whether the General Counsel met his initial burden before the Board to establish that Acevedo's union activity motivated the Company's decision to discharge Acevedo and Stevenson. The question before this Court, however, is whether substantial evidence in the record supports the Board's finding of such unlawful motivation, and its finding that the Company failed to prove that the same adverse action would have been taken even in the absence of union activity. *Transp. Mgmt.*, 462 U.S. at 395. In any event, the analysis showing that Acevedo's union activity unlawfully motivated the Company's discharge of both employees (Parts C.3 & C.4) demonstrates that the General Counsel met his burden.

clarifying Transp. Mgmt., 462 U.S. at 395, 403 n.7; *accord, e.g.*, *Willamette Indus., Inc.*, 341 NLRB 560, 562 (2004).

Moreover, the Board, with approval from this Court, routinely has found that contemporaneous violations of the Act serve as evidence of unlawful motivation. *See, e.g.*, *Goya Foods*, 525 F.3d at 1127; *McClain*, 138 F.3d at 1424-25. The same is true of the timing of the adverse action, particularly its proximity to union activity. *See McClain*, 138 F.3d at 1424 ("timing of the adverse action in relation to union activity" may "support an inference of anti-union motivation").

Both disparate treatment—when an employer treats the disciplined union supporter more harshly than other employees who engaged in similar conduct—and departure from the employer's typical practice tend to show pretext, and thus also support a finding of antiunion motivation. *See Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) (false reason supported finding of unlawful motive); *McClain*, 138 F.3d at 1424 ("deviation from past practice" supported inference of antiunion motivation); *Nabors Alaska Drilling, Inc. v. NLRB*, 190 F.3d 1008, 1015 (9th Cir. 1999) (inconsistent enforcement of policy supported finding of unlawful motive). Such pretext evidence is also relevant to assessing the employer's defense. *See Transp. Mgmt.*, 462 U.S. at 400-03; *McClain*, 138 F.3d at 1424. Indeed, if the employer's proffered explanation is pretextual—that is, either false or not in fact relied upon—the violation is deemed proven. *See McClain*, 138

F.3d at 1424 (citing *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1479 (6th Cir. 1993)); *Purolator Armored*, 764 F.2d at 1428; *see also Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981) (proffered rationale "need not be accepted if there is a reasonable basis for believing it furnished the excuse rather than the reason for . . . retaliatory action") (internal quotation omitted).

3. Acevedo's union activity was a motivating factor for the Company's adverse actions against Stevenson

Before the Board (D&O 3, 18) and the Court (Br. 32), the Company conceded that Acevedo engaged in protected union activity and that it had knowledge of that activity.[14] As demonstrated below, substantial evidence supports the Board's finding (D&O 2-4, 17-18) that Acevedo's union activity was a motivating factor for the Company's decision to discharge him. The circumstances surrounding Acevedo's and Stevenson's discharges further prove that the Company was unlawfully motivated when taking the adverse actions against Stevenson.

[14] The Company conceded this point for good reason: Acevedo told the Company he was a Union member when he was hired, complained when the Company failed to deduct union dues from his paychecks, and wore t-shirts and stickers at work that proclaimed his support for the Union's organizing campaign. (Tr. 60, 391-92, 404-05, 411-12.)

Union activity is a "motivating factor" when an employer discharges an employee based on *another* employee's union activity, whether as collateral damage or "as part of an effort to camouflage the discriminatory discharge of a known union activist." *Armcor Indus., Inc.*, 217 NLRB 358, 358 (1975), *enforced in relevant part*, 535 F.2d 239 (3d Cir. 1976); *see also Adam Wholesalers*, 322 NLRB 313, 314 n.7, 329-30 (1996) (finding violation where respondent pretextually disciplined coworker accompanying union organizer; coworker's warning stemmed from being "with the wrong person at the wrong time"). Although the unaffiliated employee is a "pawn in an unlawful design, rather than a direct target," his discipline is no less unlawful. *Dawson Carbide Indus.*, 273 NLRB 382, 389 (1984), *enforced*, 782 F.2d 64 (6th Cir. 1986). The Board will find such collateral discrimination when an employer takes action against two employees who perform the same job, only one of whom is an active union supporter, at the same time and for the same unsupported reason. *Armcor*, 217 NLRB at 358; *see also Excel Case Ready*, 334 NLRB 4, 26-27 (2001). And it is well established that, under such circumstances, a particularized showing that the Company discharged each individual employee for union activities is not necessary. *Dillingham Marine & Mfg. Co. v. NLRB*, 610 F.2d 319 (5th Cir. 1980); *see also Bay Corrugated Container*, 310 NLRB 450 (1993), *enforced*, 12 F.3d 213 (6th Cir. 1993); *Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246, 255-56 (4th Cir. 1997)

(collecting cases). In such cases, union activity is the motivation for both discharges.

Here, although it is undisputed that Stevenson did not engage in union activity, substantial evidence supports the Board's finding that the Company discharged him for the same unlawful reason it acted against Acevedo. The two were partnered on the day in question, and every decision regarding their discipline was made at the same time and explained in the same way. *See Armcor Indus.*, 217 NLRB at 358; *Adam Wholesalers*, 322 NLRB at 314 n.7, 329-30.[15]

Contrary to the Company's argument (Br. 48), those facts are sufficient for the Board reasonably to infer that Acevedo's union activity motivated the adverse actions against him *and* Stevenson. They also belie the Company's attempt (Br. 48) to use its discharge of Stevenson to justify its discharge of Acevedo, as does the Company's failure on May 16 to discharge other improperly tied-off employees who did not happened to be partnered with Acevedo (discussed below, pp. 49-50).

[15] Moreover, Felix consulted the Company's owners before deciding to discharge either employee, admittedly because he feared that discharging Acevedo would look suspicious in light of Acevedo's union activities and the imminent election. *See Ambrose Distrib. Co.*, 150 NLRB 1642, 1646 (1965), *enforced*, 358 F.2d 319 (9th Cir. 1966) (evidence of unlawfulness bolstered when employer previously expressed concern that taking action against union supporter would appear suspicious).

4. Acevedo's union activity was a motivating factor for the Company's adverse actions against him

Several categories of evidence in the record collectively support the Board's finding that the Company harbored animus towards Acevedo's union activity, which was a motivating factor for its adverse actions against him (and thus Stevenson): close temporal proximity to union activity and the representation election, as well as to Feliz's threat of wage reductions because of union activity, itself unlawful; disparate treatment of similarly situated employees; and the Company's pretextual explanation for its actions.[16]

[16] The Company mistakenly asserts (Br. 33) that because it has had a long and harmonious relationship with the Union, the Board erred in finding that the actions against Acevedo and Stevenson resulted from union animus. That argument disregards the *Wright Line* standard, which assesses whether union activity was a motivating factor for specific actions. *See W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995) (finding animus even where employer had not expressed hostility towards unionization generally); *Awery Bakeries, Inc.*, 197 NLRB 705, 711 (1972) ("[T]he past history of amicability in the bargaining relationship does not disprove the evidence of discriminatory intent and motivation vis-a-vis [the discriminatee]."). Factually, moreover, the Company's claim of harmonious relations is somewhat dubious, given its admitted (Br. 10-11) anti-union campaign, though the Board found it unnecessary to rely on that in assessing motivation. (D&O 3 n.8.)

a. Timing and a contemporaneous violation of the Act demonstrate union animus

As the Board detailed (D&O 3, 13), the timing of Acevedo's and Stevenson's discharges was highly suspicious for a few different reasons. First, it occurred just over a week before the ballots were mailed. *See Handicabs, Inc. v. NLRB*, 95 F.3d 681, 685-86 (8th Cir.1996) (timing supports finding of unlawful motive when termination was 24 days before election); *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994) ("timing of [the discharges], just two weeks before the scheduled union election, gives further credence to the charge of anti-union animus"); *Redwing Carriers, Inc.*, 224 NLRB 530, 531 (1976) (discharge one week before election supports animus). Second, and even more striking, the discipline was imposed just days after the Company committed another violation, when Feliz unlawfully told employees that their wages would decline if the Union won the election. As the Board explained, that threat is "particularly probative" because, shortly after issuing it, Feliz himself was involved in the decision to suspend and discharge Acevedo and Stevenson. (D&O 3.) And, notably, when Feliz made the unlawful threat, Acevedo alone challenged him, in front of other employees, earning Feliz's displeasure.

Rather than challenge the Board's legal holding (D&O 1 n.3, 16-17) that Feliz's threat was unlawfully coercive, the Company disputes (Br. 34-36) the

factual finding that Feliz made the threat, citing Feliz's own denial.[17] More specifically, the Company challenges (Br. 35) the Board's credibility determination (D&O 1, 13 n.36), which accepted Acevedo's version of Feliz's remarks. The Company fails, however, to meet its heavy burden to show that the determination is "inherently unreasonable" or "self-contradictory." *McClain*, 138 F.3d at 1422.

To the contrary, in addition to his observation of the witnesses' demeanors (D&O 9), the judge gave two reasons for crediting Acevedo's account over Feliz's denial (D&O 13 n.36). First, Acevedo's testimony was persuasively specific and, second, Feliz's denial (Tr. 104) that he mentioned wages was directly contradicted by the Company's own witness, Gerardo Luna. Luna, a long-time employee testifying "at the behest of his employer" (D&O 17), admitted that Feliz spoke with the employees that day about wages (Tr. 46-47, 106, 847-48). As noted above, p. 18, testimony of current employees is particularly reliable.[18] And

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[17] The Company does not challenge the Board's legal holding for good reason, as it is well settled that a supervisor's comment that "wages might be reduced as a result of a vote for unionization" is unlawful. *President Riverboat Casinos*, 329 NLRB 77, 77 (1999); *see also Piggly Wiggly, Tuscaloosa Div. Commodores Point Terminal Corp. v. NLRB*, 705 F.2d 1537, 1542 (11th Cir. 1983).

[18] The Company misreads the record by claiming that "the [judge] prohibited [company] counsel from questioning Luna more closely about this point." (Br. 36 n.5 n.3.) After Luna had already acknowledged that Feliz discussed wages during the meeting, company counsel asked a question the judge identified as leading. While emphasizing that he wanted to hear what Luna himself remembered, the judge invited company counsel to continue the same line of questioning but

although the Company attacks Acevedo (Br. 35-36) as generally untruthful, the judge did not discredit any of Acevedo's testimony. Rather, he commented on Acevedo's "selective memory in failing to recall whether fall protection was discussed" during McNett's May 16 toolbox talk. (D&O 14 n.39.) Even if the judge had discredited Acevedo on that point, crediting only part of a witness' testimony is common, *see* above, pp. 21 n.11. Because the Company failed to meet the bar for reversing the Board's credibility determinations, the Board's finding of an unlawful threat, and consideration of that threat in finding unlawful animus, must stand.

Finally, while the Company argues more generally that the Board placed "too much emphasis on timing" (Br. 34), it presents no authority establishing that timing—particularly proximity to a representation election and to another violation committed by one of the decisionmakers whose motive is in dispute—is not a significant factor in determining motive. Instead, the Company attempts to draw attention from the suspicious timing of the discharges by pivoting to other aspects of the Board's analysis without ever truly joining issue on timing.[19] In fact, as the

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counsel changed the subject and did not return to it. (Tr. 848-49.) Luna's claim that Feliz made no threats is of little significance; the judge used Luna's testimony to corroborate Acevedo's assertion that Feliz discussed wages.

[19] Specifically, the Company asserts (Br. 42-43) that it cannot be penalized for applying established personnel policies (a point refuted by evidence of disparate

Board aptly noted (D&O 3, 14), timing alone can be sufficient to demonstrate animus. *Inova Health Sys. v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015). And this Court has given heavy weight to the timing of an employee's discharge in determining motive. *See, e.g.*, *Rockwell Intl. Corp. v. NLRB*, 814 F.2d 1530, 1536 (11th Cir. 1987); *NLRB v. S. Florida Hotel & Motel Assoc.*, 751 F.2d 1571, 1583 (11th Cir. 1985). Contrary to the Company's assertion, therefore, the Board rightly accorded significance to timing in its motive analysis, in addition to other types of evidence, discussed below.

b. The Board's well-supported finding that the Company more strictly enforced its fall-protection policy against Acevedo and Stevenson shows animus

There is abundant evidence in the record that the Company more strictly enforced its fall-protection policy than it had in the past when it discharged Acevedo and Stevenson for their first violation of the policy—and first discipline for any reason. As the Board found (D&O 3-4, 15, 17-18), the Company has imposed discipline short of discharge for other employees' first and second fall-

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treatment discussed below, *see* Part C.4.c). Although the Company also purports to challenge (Br. 36-37) a violation based on McNett's threat of wage loss, the Board did not pass on that additional unfair-labor-practice finding by the judge, because it "would be cumulative and would not materially affect the remedy." (D&O 1 n.2.) Nor did the Board rely on McNett's statement in finding that animus motivated Acevedo's and Stevenson's discharges.

protection violations and did not warn or otherwise discipline other employees who were improperly tied off on the day Acevedo and Stevenson were suspended. *See Tracer Protection Servs.*, 328 NLRB 734, 735 (1999) (discharging employee for violation other employees committed without discharge evidences unlawful motivation); *Hyatt Regency Memphis*, 296 NLRB 259, 263 (1989) (same). The Company's efforts to explain that disparate treatment are unsupported and unpersuasive.

The record reveals that, unlike its treatment of Acevedo and Stevenson, the Company did not discharge several other employees for first and second violations of the fall-protection policy. In what the judge deemed a "glaring example of such disparate treatment," Timothy Bryant, an employee who had worked for months without receiving any safety training at all, attended the same safety orientation as Acevedo and Stevenson. (GCX2(c), GCX4(b).) Just one month later, Safety Coordinator Ramirez observed Bryant "laying block on a leading edge," 18 feet off the ground, without a harness. (GCX4, Tr. 433-34, 546-47). Bryant was suspended. (Tr. 548.)

Other employees similarly received only warnings or suspensions for violating the Company's fall-protection policy. Richard Haser, for example, was sent home and required to attend a safety orientation for working while not properly tired off. The foreman's daily log described it as Haser's second offense.

(GCX3, Tr. 389-90.) And Brandon Carollo was suspended for his first violation, and again for his second. Carollo was ultimately discharged for a combined offense of his third fall-protection violation and insubordination. (D&O 3; Tr. 542-43, 571-72, 638-40, 899, GCX8(a)-(e).)

Moreover, when Carollo requested unemployment benefits, the Company explained to Florida's unemployment agency—consistent with the examples above—that he had been discharged after his third violation. Significantly, in that filing, the Company described "the consequences of violating the [fall-protection] rule or policy" as "first and second warnings, third discharge."[20] (GCX8(b).) The language of the warnings the Company issued to Acevedo and Stevenson when it suspended them also suggests a policy of progressive discipline, classifying their violations as "level 1" offenses on a scale of 1-3 and "final." (D&O 14; GCX5, GCX6.)

[20] While the Company insists (Br. 47) that the unemployment forms "simply recited the facts of Carollo's discharge," it concedes (Br. 48) that the "policy" it identified was that "[t]he claimant was on a scaffold over 6 feet off the ground and was not tied off securely as OSHA rules require" (GCX8(b)), a nearly verbatim recitation of its fall-protection policy). *See* GCX2(a). And the Company does not now suggest that Carollo did not violate that policy three times. At the very least, the forms suggest that the Company imposes progressive discipline for fall-protection violations; nowhere do they state that the policy requires discharge for a first offense or offer any explanation for why the Company twice only warned Carollo for violating what it now insists is a "zero tolerance" policy. (GCX8(b).)

Further, the Board's animus finding is supported by the Company's disparate treatment of Acevedo and Stevenson on the day they were suspended. That day, other masons working nearby were also tied off incorrectly or not at all. But the Company took no disciplinary action against them, even short of discharge. (D&O 14 n.40, 15 n.44; Tr 158-60, 424-25.)

The Company, understandably, does not suggest that its failure to discipline other employees who violated the fall-protection policy on May 16 would not amount to evidence of disparate-treatment supporting the Board's finding of animus. Instead, it challenges (Br. 41) the Board's crediting of Acevedo's and Stevenson's testimony that other employees were tied off incorrectly that day. That credibility determination was supported by the judge's observation (D&O 9) of the witnesses' demeanors. In addition, the judge cited (D&O 14-15 nn.40 & 44) the greater specificity of the employees' testimony, which described (Tr. 425) how some masons were tied off to the scaffolds and others to the cross-bracers, in contrast to the foremen's overly conclusory and generalized contrary testimony (Tr. 625, 769). And the Company's arguments do not meet the high burden required to overturn a credibility determination.

Contrary to the Company's contention, Acevedo's and Stevenson's testimony was not contradictory. Both employees testified that prior to the May 16 toolbox talk, no employees wore fall-protection equipment on the indoor scaffolds

of the UT jobsite. (Tr. 139, 154, 418, 424-25.) Acevedo further testified that after McNett instructed employees to tie off on the indoor scaffolds during that toolbox talk, employees tied off in different, incorrect ways. (Tr. 424-25.) While the Company is correct that Stevenson stated "nobody had harnesses on that morning," the Company omits the critical detail that Stevenson was referring to the period of time *before* the toolbox talk, and that he corroborated Acevedo's testimony that most employees tied off after the talk. (Tr. 154-56.) The Company's observation that Acevedo did not describe or identify the specific employees using their safety equipment incorrectly does not call into question his description of how they secured their equipment.[21]

The Company attempts to explain away its failure to discharge several other employees for their first fall-protection violations by claiming (Br. 44) that it only discharges employees for violations witnessed by a Company representative, as opposed to a general contractor's representative. But the Board reasonably rejected that explanation, which is inconsistent with the record and with the importance the Company attaches to its policy. The most obvious factual inconsistency is the Company's failure to discharge employee Bryant, even though his violation of the fall-protection policy was witnessed by Safety Coordinator

[21] The Company's challenge to the Acevedo's and Stevenson's overall credibility is unpersuasive for the reasons discussed above (pp. 44-45, 49-50).

Ramirez. To circumvent that glaring example, the Company claims it intended to discharge Bryant, but did not because Bryant "cannily" disregarded his own termination, and because of a largely absent foreman and administrative errors. (Br. 45.) The Board reasonably concluded that the Company's "convoluted defense is simply not credible." (D&O 3.) Notably, accepting the Company's story means believing that Bryant returned to work as usual after allegedly being fired, and continued to work for several weeks without the Company noticing.

As described, moreover, the events of May 16 also undercut the Company's contention that all violations witnessed by a company representative result in discharge. Foremen Morales first witnessed Acevedo's and Stevenson's fall-protection violation but instructed them to don safety equipment rather than disciplining them. McNett's comment to Morales, "it's a good thing I didn't catch them," implied that he would have disciplined the employees, suggesting, at best, that the Company inconsistently applied its purported zero-tolerance policy depending on which company representative witnessed the violation. And, of course, Morales and McNett failed to discipline other employees that day.

More fundamentally, the company-witness explanation borders on senseless in the face of the Company's insistence on the importance of the fall-protection policy and zero tolerance. Essentially, the Company's position is that it trusts general contractors' accounts of violations enough to discipline, but not discharge,

employees. That the Company disciplines employees at all under those circumstances demonstrates that it has accepted that the violations occurred; the Company provides no explanation for why, in that case, it would not apply its purported zero-tolerance policy. Nor does it acknowledge the logical, but incongruous, consequence of its supposed non-company-witness exception: it could have reliable knowledge that an employee had repeatedly violated the policy and be powerless to discharge the offender.

Finally, the Company complains (Br. 44) that the Board improperly questioned its business judgment in rejecting its claim that it has discharged employees for first-time fall-protection violations analogous to Acevedo's and Stevenson's. But, as described, substantial evidence supports the Board's finding that "no other employees were discharged for failing to tie off properly as a first offense." (D&O 18.) As the Board explained, the circumstances of the employees the Company relies upon to support its argument, Timothy Golphin and Jaswin Leonardo, are not comparable. Specifically, both Golphin and Leonardo engaged in "severe compound safety violations." (D&O 3, 18.) Golphin, for instance, was both talking on his cell phone and not tied off at all, while working at an elevation of 38 to 40 feet. (D&O 3, 18; CX33, Tr. 636-37.) Notably, his discharge form gave equal weight to his failure to tie off and to his use of his cell phone while working. (D&O 3, 18; CX33.) Similarly, the Company discharged Leonardo after

Ramirez observed him not using fall protection, and then improperly dismounting the scaffold by stepping on the cross-braces instead of using a ladder. (D&O 3, 18; RX34.)

The Board's observation that the nature of Golphin's and Leonardo's violations distinguishes them materially from Acevedo's and Stevenson's is not equivalent to questioning the Company's business judgment. The Board did not find that the Company *could not* reasonably maintain a policy of discharging employees for the least, isolated violation of the fall-protection policy. The Board simply found that the Company failed to prove that it in fact did so. While the Company is correct that Golphin's and Leonardo's cases would fit such a rule, it fails to acknowledge that they also fit the contrary picture established by the rest of the evidence. Considered together, the comparator employees' cases demonstrate that it takes more than a single failure to tie up to warrant discharge as the Company has actually applied its fall-protection policy. *See NLRB v. Future Ambulette, Inc.*, 903 F.2d 140, 143 (2d Cir. 1990) (failure to discipline other employees for similar or more egregious misconduct supports inference of unlawful motive rather than good-faith business judgment); *accord McClain*, 138 F.3d at 1426 (past leniency in enforcing anti-drug policy and previous willingness to allow employees who tested positive to be retested demonstrated unlawful motive rather than legitimate business reason).

c. The Company's pretextual explanation for its adverse actions against Acevedo and Stevenson demonstrates union animus

The Company insists that it discharged Acevedo and Stevenson pursuant to a zero-tolerance policy for fall-protection violations, which required termination. As detailed above, however, the record does not support the existence of such a policy. Several other employees were given discipline short of discharge for first and second violations; notably, employees in violation of the same policy as Acevedo and Stevenson, on the very same day, were not disciplined. Moreover, no other employee has been discharged—like Acevedo and Stevenson—for not being tied off properly as a first offense without an aggravating, compound violation. That disparate treatment indicates that the Company's invocation of "zero tolerance" to justify its adverse actions against Acevedo and Stevenson is pretextual. *See NLRB v. Brewton Fashions, Inc.*, 682 F.2d 918, 924-25 (11th Cir. 1982) (disparate treatment supports conclusion that asserted legitimate reason was pretext).

As the Board explained, that pretext finding is buttressed by the fact that Feliz made the "unprecedented and suspicious decision to contact" the Company's owners before determining Acevedo's and Stevenson's discipline (D&O 3), admittedly because he was aware that Acevedo was a vocal union supporter and that the election was imminent (D&O 15 n.45; Tr. 91-93.) It was only after Feliz

and the owners discussed Acevedo's pro-union status and activities that the suspensions were definitively escalated to discharges. The Company argues (Br. 39-40) that it was Feliz's typical practice to suspend pending discharge to carefully consider his disciplinary decision, and that the content of Feliz's conversation with the owners proves the Company's lack of animus. But it never challenges the Board's key findings that it was unprecedented and suspicious for Feliz to contact the owners for help making disciplinary decisions, which he typically made on his own, and that he did so specifically because of Acevedo's union activities.

Based on the Company's disparate treatment of employees and application of its purported zero-tolerance policy, and on Feliz's unusual decision to call the owners before discharging Acevedo and Stevenson, the Board reasonably found (D&O 3, 18) that the Company's asserted basis for discharging Acevedo and Stevenson was pretextual, *i.e.*, either false or not the real motivation for the discharges. In combination with suspicious timing, disparate treatment of similarly situated employees, and a contemporaneous unlawful threat, that pretextual explanation amply supports the Board's finding that union activity was a motivating factor in the Company's decision to discharge Acevedo and Stevenson.

5. The Company failed to establish its affirmative defense that it would have discharged Acevedo and Stevenson absent Acevedo's union activity

As demonstrated, substantial evidence supports the Board's finding that Acevedo's union activity was a motivating factor in his and Stevenson's discharges. Considered as a whole, the record further supports the Board's finding (D&O 4) that the Company failed to prove that it would have discharged them absent that activity. And the Board's finding that the Company's explanation for the two employees' discharges was pretextual compels rejection of that defense. *See McClain*, 138 F.3d at 1424.

Thus, in rejecting the Company's *Wright Line* defense, the Board did not give "short shrift" (Br. 43) to the Company's various fall-protection procedures and trainings. There is no dispute that the Company had a stringent policy that Acevedo and Stevenson did not follow on May 16, despite ample training. The fatal problem with the Company's argument is that the record belies its contention that it enforced the policy against Acevedo and Stevenson consistent with its past practice. Instead, substantial evidence in the record shows that the Company invoked the policy to justify discriminatory discharges in violation of Section 8(a)(3) and (1) of the Act. Accordingly, the Board did not abuse its discretion in overruling the Company's challenges to the two employees' ballots.

CONCLUSION

The Board reasonably found that the Company laid off Wrench, Smith, Barlow, Hickey, Greenlee, Clark, and Reed, and, therefore, the seven masons were eligible to vote. The Board also properly counted the ballots Acevedo and Stevenson because substantial evidence supports its finding that the Company had discriminatorily discharged them. Accordingly, the Board's certification of the Union must stand, and the Company's admitted refusal to recognize and bargain with the Union violates the Act. The Board thus respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board

February 2019

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 18-14163
	*	18-14400
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	12-CA-22114
	*	
Respondent/Cross-Petitioner	*	
	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12,919 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2006.

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Dated at Washington, DC
this 15th day of February, 2019

UNITED STATES COURT OF APPEALS
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	*	
Respondent/Cross-Petitioner	*	
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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the address listed below:

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